(2)

No. 91-1833

In The

Supreme Court of the United States

October Term, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, *et al.*,

Petitioners,

vs.

GROVER VIGIL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JOEL JASPERSE
Attorney for Respondents
Northern New Mexico Legal Services, Inc.
P.O. Box 1475
Gallup, New Mexico 87305
(505) 722-4417

3

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the agency's decision to terminate the Indian Children's Program (ICP), an on-going program conducted pursuant to congressional mandate and funding and agency rules governing eligibility and program services which for many years provided a crucial array of clinical and support services to handicapped Indian children with whom the United States has a special relationship, constitutes rulemaking subject to the notice and comment requirements of the APA, 5 U.S.C. § 553.

2. Whether the court of appeals erred in holding that the special relationship between the Indian people and the federal government, the Snyder Act, 25 U.S.C. § 13, and congressional creation and funding of a program providing clinical and support services to handicapped Indian children under the Snyder Act and Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq.*, provide "law to apply" for purposes of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §.701(a)(2), of the agency's termination of the program's services, where the Snyder Act, the Indian Health Care Improvement Act, the duty of fairness owed to the children under the special relationship which has developed between the United States and Indian people, continued congressional recognition of and funding for the ICP, the Education for All Handicapped Act, 20 U.S.C. § 1400 *et seq.*, the Indian Health Service Manual, and agency rules regarding ICP eligibility provide a judicially administrable standard of review to apply.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

Contents

Statutes Cited:

Contents

Other Authorities Cited:

Contents

No. 91-1833

In The

Supreme Court of the United States

October Term, 1992

EVERETT RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, *et al.*,

Petitioners,

vs.

GROVER VIGIL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Grover Vigil, *et al.*, hereby oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Petitioners' App., 1a-16a) is reported at 953 F.2d 1225. The opinions of the district court (Petitioners' App. 17a-45a, 46a-56a) are reported at 746 F. Supp.

1471. References herein are to the opinions as reported.

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*; the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §§ 1601 *et seq.*; and the Indian Health Service Manual are reproduced in Respondents' Appendix, 1a-16a, *infra*. Relevant portions of the Snyder Act, 25 U.S.C. § 13, and Administrative Procedure Act which are found in Petitioners' Appendix at 57a-58a and 63a-66a, are not reproduced.

STATEMENT OF THE CASE

1. The Indian Children's Program (ICP) is a joint program of the Indian Health Service (IHS) and Bureau of Indian Affairs (BIA) which provides clinical and support services to handicapped Indian children. As originally envisioned, the ICP, then referred to as the Indian Children's Project, entailed establishment of therapeutic and residential treatment centers for disturbed Indian children. H.R. Rep. No. 94-1026, 94th Cong., 2d Sess., 80-81, reprinted at 1976 U.S. Code Cong. & Admin. News 2718-2719. As it came to be implemented, the ICP provided an array of services which included identification of handicapped Indian children, diagnosis of their handicaps, development and monitoring of their treatment plans, consultative visits in the children's home communities, training, and clinical services such as physical therapy. ICP services were provided to the children both in their homes and in clinical settings. As the program developed after 1980, long term treatment planning and follow-up of individual clients became an ICP staff priority. In addition to these direct services to handicapped children, the ICP provided training in child development, prevention of handicapping conditions, and care of handicapped children to parents, community groups, school personnel, and health care personnel. This array of services was crucial to enable the children

to reach their optimal level of development.

The IHS decided to terminate these ICP services, announcing its decision to various IHS offices and referral sources on August 21, 1985. ICP services to 426 children who were then active clients of the ICP were ceased as of October 1, 1985. In the six year period prior to its termination, the ICP provided services to approximately 2,405 children.[1] The IHS did not provide written notice of the cessation of these services to any of these children. It terminated these services without affording any notice and comment procedures under the Administrative Procedure Act and without publication in the Federal Register.

The ICP termination resulted in the children no longer being able to obtain the services previously available to them through the ICP. No longer were regular physical therapy, occupational therapy, speech/language therapy, and multi-disciplinary screening and evaluation available. Home parent education and training services to help parents understand how to help their children with their handicapped needs, and referral, follow-up, and on-going case planning and management services were also no longer available. The injury caused to the children was particularly egregious because not only were the children no longer able to obtain these necessary services from the IHS and BIA, these services were generally unavailable in the communities in which they lived, even

---

1. A General Accounting Office report issued March, 1990 entitled "Special Education: Estimates of Handicapped Indian Preschoolers and Sufficiency of Services" estimates that of nearly 3,000 handicapped Indian preschool children ages 3 and 4 who live on the 63 Indian reservations in the United States that have BIA schools, only 838 children were receiving special education services in the 1988-89 school year. Based on handicapping condition prevalence rates from enrollment data obtained from BIA schools for the 1986-87 school year, the GAO report estimates that there are 650 handicapped pre-school children in New Mexico and 2,485 in Arizona. The report thus provides a good estimate of the number of handicapped Indian pre-school children in the area served by the ICP who are members of the certified class.

when the children entered school. When the children were preschool age, these services were even less available. See note 1, *supra*.

2. Plaintiffs, a certified class of handicapped Indian children who received or were eligible to receive ICP services, filed this lawsuit on September 26, 1986, seeking declaratory and injunctive relief. They challenged the termination of ICP services as being in violation of the publication requirements of the APA, 5 U.S.C. § 552, the rule-making requirements of the APA, 5 U.S.C. § 553, the Snyder Act, 25 U.S.C. § 13, the Indian Health Care Improvement Act, 25 U.S.C. §§1601 *et seq.*, the federal trust responsibility to Indians, various agency rules and regulations, their due process rights under the Fifth Amendment, and as being arbitrary and capricious, 5 U.S.C. § 706.

The district court granted summary judgment to the children on July 6, 1990. It declared that since the agency never afforded any notice and comment opportunity and failed to publish its decision in the Federal Register the termination of ICP services violated the APA, 5 U.S.C. § 552 and § 553. It held that the ICP termination was subject to judicial review, that it constituted rulemaking, and that it was ineffective for noncompliance with the APA rulemaking and publication requirements. For these same reasons, the district court found it premature and unnecessary to review the children's substantive claims, including their constitutional due process claim and their claim under 5 U.S.C. § 706 that the ICP termination was arbitrary and capricious. On August 28, 1990, the district court issued injunctive relief reinstating the ICP. The government thereafter reconstituted the ICP and it currently continues to provide services as before.

3. The government appealed arguing (1) that the termination was not judicially reviewable under the APA because it was committed to agency discretion under 5 U.S.C. § 701(a)(2);(2) that

the termination was not a legislative rule subject to rulemaking under 5 U.S.C. § 553; and (3) that the termination was not arbitrary and capricious under 5 U.S.C. § 706(2)(A). The government did not appeal the district court's holding that the termination was invalid for noncompliance with the publication requirements of 5 U.S.C. § 552. Nor did the government appeal the injunctive relief granted to the children.

The court of appeals reviewed *de novo* the district court's determination of jurisdiction and its grant of summary judgment to the children. The court of appeals determined that since the ICP was "Congressionally created and funded," received "recurring budget recognition" by Congress, and there exists a "special relationship between the Indian people and the federal government," judicial review was appropriate. 953 F.2d 1225, 1231. The court of appeals also ruled that under *Morton v. Ruiz*, 415 U.S. 199 (1974), notice and comment rulemaking procedures were required because the ICP termination action "cuts back congressionally created and funded programs for Indians." 953 F.2d. 1225, 1231. Finding no error, it affirmed.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because it presents none of the weighty issues postulated by petitioners. Instead, due to the procedural posture of the case, review of one of the questions presented in the petition is premature. The remaining issue presents no conflict among the circuits, and no significant legal question.

1. The petition suggests that the central issue to be reviewed is the determination whether the decision to terminate the Indian Children's Program is committed to agency discretion. However, this issue is not ripe at this juncture. Both the district court and the court of appeals held that the agency erred in terminating the

program without complying with the APA's notice and comment rulemaking requirements, 5 U.S.C. § 553. As the district court recognized, review of the plaintiff's substantive challenges to the termination of the ICP was premature because compliance with the APA's notice and comment rulemaking requirements might lead to a different decision, or a different basis for the same decision. In either event, the need for judicial review of that decision may be obviated, or the basis for such review might be drastically changed.

The "law to apply" determination goes to the court's need to have a "meaningful standard" by which to determine whether an agency action is "arbitrary and capricious" under § 706. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Here, the district court did not make an "arbitrary and capricious" determination because the agency action was found procedurally invalid under the APA. Until the agency first complied with the APA's procedural requirements, it was premature for the court to decide whether the action was "arbitrary and capricious." *Bellarno International v. FDA*, 678 F. Supp. 410 (E.D.N.Y. 1988). Judicial review was proper based on the agency's procedural violations whether or not it was proper under § 701(a)(2) for the purpose of an "arbitrary and capricious" determination. When "an agency violates a procedure mandated by the APA," the agency action "must be set aside" on judicial review. B. Mintz and N. Miller, *A Guide to Federal Agency Rulemaking*, 342 (Administrative Conference of the United States, 1991). Since the "law to apply" issue presents no need for review at this time, the petition should be denied.

In addition, the district court held that the agency violated the publication requirements of 5 U.S.C. § 552. The government appealed only the § 553 ruling. The § 552 ruling and grant of injunctive relief were not appealed and are not presented for review. Since the § 552 ruling provides an independent basis for the injunctive relief granted, the § 553 ruling presents no compelling need for review.

2(a). The unanimous court of appeals and district court correctly decided that the notice and comment rulemaking requirements of the APA, 5 U.S.C. § 553, applied to the termination of the ICP. Rulemaking is intended to ensure that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Morton v. Ruiz*, *supra*, at 232. "A procedurally inadequate determination to deny benefits to Indians in frustration of their legitimate expectation ... is inconsistent with the 'distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people'." 476 F. Supp. 1471, 1480 (citing *Morton* at 236, quoting *Seminole Nation v. United States*, 316 U.S. 286, 196 (1942)). Instead of providing opportunity for participation in a crucial decision regarding their health, the very agencies obligated to serve Indian children denied them that opportunity. The lower court decisions preserve the integrity of the rulemaking process.

Rulemaking is "agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations." *A Guide to Federal Agency Rulemaking*, *supra*, at 39-40. Agency action is legislative not only because of its future effect but because of its primary concern with policy considerations. *American Exp. Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973). Rulemaking involves the promulgation of concrete proposals, declaring applicable policies, binding on the public generally. *PBW Stock Exchange, Inc. v. Securities and Exchange Commission*, 485 F.2d 718 (3rd Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

All of the the hallmarks of rulemaking are present in the agency decision terminating the ICP. First, the action had *future effect*. It

completely eliminated services which the children had previously been eligible to receive. This was far more than a mere one-time allocation of monies. Second, the action had effect on a particular *group of persons*. It affected most immediately and particularly the 426 children who were actively receiving ICP services when the action was taken. Third, the action prescribed a *change in policy* regarding the organization of the ICP and services it provided. The ICP was specific in its organizational structure, location, funding, staffing, services, and eligibility for services. When the government announced its decision to terminate the clinical and support services it had for years provided to handicapped Indian children, it prescribed a major policy change which affected every aspect of the ICP.

When an agency changes an existing rule and that change has a substantial impact upon rights of the public, rulemaking is required. *National Retired Teacher's Ass'n v. U.S. Postal Service*, 430 F. Supp. 141, 148 (D.C.D.C. 1977), *aff'd*, 593 F.2d 1360 (D.C. Cir. 1979); *Brown Export, Inc. v. United States*, 607 F.2d 695 (5th Cir. 1979); *State of Alaska v. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989). Changes which affect eligibility are particularly subject to rulemaking. *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2d. Cir. 1972); *Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982); *Lewis v. Weinberger*, 415 F. Supp. 652 (D.N.M. 1976). Here, the agencies established rules determining who was eligible for ICP services (R. 14, Plaintiffs' Memorandum in Support of Motion for Class Certification, Exhibit B).[2] These rules were applied by the agencies in their operation of the ICP, to referrals from sources in the community, and to parents seeking ICP services for their children. The announcement that the ICP would

2. The Indian Health Service Manual also sets out in great detail the duties the agency adopted for itself for its provision of health services to handicapped Indian children. *See, e.g.*, IHS Manual, Chapter 13 (7-1-85). App., *infra* at 10a - 16a. These rules are binding on the agency. *Morton v. Ruiz, supra*, at 235.

no longer provide clinical and support services to handicapped Indian children changed these eligibility rules and required rulemaking in order to be effective.

(b) The government relies on *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), for its position that the ICP termination action was not rulemaking. *Overton Park* held that an agency decision to expend federal funds to build a highway through a park was not rulemaking. *Overton Park* is distinguishable. The agency action here involved termination of an on-going program which provided services for many years to needy recipients with whom the United States has a special relationship, all pursuant to congressional mandate and agency rules governing eligibility and program services. These facts set this case apart from *Overton Park*.[3] This does not necessarily mean that every agency reallocation of money requires rulemaking. However, where the action terminates an entire program's services to individuals eligible for such services under the agency's own rules, APA procedural protections are required. *See, e.g., Morton v. Ruiz, supra; Vigil v. Andrus, supra*. Moreover, it would be a terrible irony if an agency's self-described reallocation decision entirely terminating services and eligibility for those services was somehow found not to be a rule when agency actions eliminating some individuals' eligibility but not terminating an entire program's services have been found to be a rule. *Morton v. Ruiz, supra*.

3. Reviewing courts have viewed changes in agency direction differently than initial courses of action. *See, e.g. Robbins v. Reagan*, 780 F.2d 37 (D.C. Cir. 1985) ("Once an agency has declared that a given course is the most effective way of implementing the statutory scheme, the courts are entitled to closely examine agency action that departs from this stated policy." *Id.* at 45, citing *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 40-44 (1983)); *Heckler v. Chaney, supra*, at 853 (Marshall, J, concurring in judgment)("the agency may well narrow its own . . . discretion through historical practices from which it should arguably not depart in the absence of explanation, or through regulations.").

(c) The government fails to offer any authority exemplifying or supporting its fear that the rulemaking process will have a negative effect on its operation of Indian programs. In any event, it is clear that the rulemaking provisions of 5 U.S.C. § 553 were designed to assure fairness and mature consideration of rules of general application. *N.L.R.B. v. Wyman-Gordan Co.*, 394 U.S. 759 (1969). In this case, the government had opportunity to demonstrate why injunctive relief reinstating the ICP should not be granted, but failed to make any showing of harm. As in their petition, they produced only what the district court described as a "string of unsupported premises and conclusions" yet "marshall[ed] neither facts nor well-grounded legal arguments in support of these feared effects." 476 F. Supp. at 1485, 1486. On the contrary, the children fear that giving the IHS and BIA carte blanche to conduct its Indian programs will deleteriously affect those whom the agencies are supposed to serve, as they demonstrated below. *Id.* at 1484.

Moreover, § 553(b)(3)(B) of the APA provides an exception whenever "the agency for good cause finds ... that notice and public procedures are impracticable, unnecessary, or contrary to the public interest." § 553 (d)(3) also allows an agency, upon finding good cause, to make a rule effective immediately, thereby avoiding the 30 day delayed effective date requirement of § 553. Thus, the court of appeals' decision will not cause any undue restriction on the government's operation of its Indian programs.

3(a). Judicial review of agency action is a right afforded by the APA which can only be denied when the agency shows " 'clear and convincing evidence' of legislative intent to restrict access to judicial review." *Citizens to Protect Overton Park v. Volpe, supra*, at 410; 5 U.S.C. § 702. There is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 670 (1986). An exception to judicial review exists "to the extent that" the action "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

However, it is a "very narrow" exception. *Overton Park, supra.* It applies only in those rare circumstances where "statutes are drawn in such broad terms that in a given case there is *no law* to apply." *Id.* (emphasis added). This "Court has limited the exception to judicial review provided by 5 U.S.C. § 701(a)(2) to cases involving national security . . . or those seeking review of refusal to pursue enforcement actions." *Franklin v. Massachusetts*, No. 91-1502, (June 26, 1992) (Stevens, J., Blackmun J., Kennedy, J., and Souter, J., concurring in judgment).

The court of appeals correctly found "law to apply" in a history of congressional funding for the ICP under the IHCIA, 25 U.S.C. § 1601 *et seq.*, and Snyder Act, 25 U.S.C. § 13; in the duty of fairness owed to the children under the special relationship which has developed between the United States and Indian people; and in the Snyder Act itself. The district court also found "law to apply" in the IHCIA and Education for All Handicapped Act, 20 U.S.C. § 1400 *et seq*. These sources, together with the IHS Manual and rules adopted regarding the ICP, provide ample "law to apply" for purposes of judicial review. These sources of law, expressed in both broad standards and detailed duties, cannot be minimized. Where such law exists, it cannot fairly be concluded that there is clear and convincing evidence that Congress intended to withhold judicial review. Where such law exists, it cannot fairly be concluded that no law applies so that judicial review is precluded.

(b) The decision of the court of appeals is consistent with the decisions of other circuits. Other circuits have found in both the IHCIA and federal Indian trust responsibility law "law to apply" to review agency actions regarding Indian health care. *McNabb for McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987) (IHS has primary responsibility for the maternity costs of indigent Indians); *White v. Califano*, 437 F. Supp. 543, *aff'd*, 581 F.2d 697 (8th Cir. 1978) (IHS, rather than the State of South Dakota, is responsible for Indian mental health care).

(c) The IHCIA was enacted so that the United States could fulfill

> its special responsibilities and legal obligations to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with resources necessary to effect that policy.

25 U.S.C. § 1602.

§ 1601(a) provides that

> Federal health services to . . . Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American people.

This legislation makes clear that in its provision of health care to Indians, the government is bound by its special relationship with them. Although the government argues that it is only constrained by this "trust" responsibility when it deals with Indian property, Congress has made clear through §§ 1602 and 1601(a) that when the government provides Indians with health services, it does so as a direct result of this special relationship. In effect, Congress has admitted for the IHS that the "trust" responsibility applies to its provision of health care. Thus, the government cannot properly argue here that this special relationship provides no applicable law for review of its actions.

(d) The Snyder Act provides that the

> Bureau of Indian Affairs . . . shall direct, supervise, and expend such moneys as Congress may . . . appropriate, for the benefit, care and assistance of Indians . . . for relief of distress and conservation of health.

25 U.S.C. § 13.

This language mandates that congressional funding for Indian health be used to relieve their distress and conserve their health. BIA and IHS actions which do not accomplish this mandate are not in accord with the Snyder Act and can be judged contrary to it. Although broad, this standard is not devoid of any meaning so as to grant those agencies who receive funding under it complete and unfettered discretion as to how they use such funding. As stated by the district court, "[a] statutory command of this breadth confers broad discretion upon the agency to apply its particular expertise in determining how to achieve its mandated objective and in optimally allocating scarce resources to this end, but the breadth of the command does not imply discretion to act in a manner that ignores or disserves the objective." 746 F. Supp. 1471, 1478.

(e) Congressional appropriations history is also relevant and may be referred to "for guidance in determining the proper rules for providing Indian health assistance." *McNabb, supra*, at 793, note 6; *Morton v. Ruiz, supra*. In determining the propriety of a BIA termination of general assistance benefits to Indians living off, but near an Indian reservation, this court noted that

> [e]ven more important is the fact that, for many years, to and including the appropriations year at issue, the BIA itself made continual representations to the appropriations subcommittees that nonurban Indians living "near" a reservation were eligible for BIA services.

Id. at 214.

Thus, the district court did not err in finding "that the members of Congress took the IHS at its word in explaining its implementation of the IHCIA" when they appropriated funding for the ICP year after year. *McNabb, supra*, at 793, note 6.

(f) Finally, if any doubt remains, any uncertainty as to the construction of these laws must be resolved in favor of the children. Statutes enacted to benefit Indians must be liberally construed in their favor. *Ruiz v. Morton*, 462 F.2d 818 (9th Cir. 1972), *aff'd*, 415 U.S. 199 (1974); *Fox v. Morton*, 505 F.2d 254 (9th Cir. 1974); *Wilson v. Watt*, 703 F.2d 395 (9th Cir. 1983). Pursuant to this canon of construction, these laws must be interpreted in such a way as to favor, rather than restrict, judicial review under the APA. This is especially true here where the children have stated claims that these laws were violated by the very agencies obligated to serve them. "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith." *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

JOEL JASPERSE
Attorney for Respondents
Northern New Mexico Legal
Services, Inc.
P.O. Box 1475
Gallup, New Mexico 87305

APPENDIX A — SECTION 552 (a) (1) OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 552 (A) (1)

§552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedures, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice

of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

APPENDIX B — SECTION 702 OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 702

§702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

APPENDIX C — SECTION 706 OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Appendix C

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX D — SECTION 1601 OF THE INDIAN HEALTH CARE IMPROVEMENT ACT, 5 U.S.C. § 1601

§ 1601. Congressional findings

The Congress finds that—

(a) Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people.

(b) A major national goal of the United States is to provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level and to encourage the maximum participation of Indians in the planning and management of those services.

(c) Federal health services to Indians have resulted in a reduction in the prevalence and incidence of preventable illnesses among, and unnecessary and premature deaths of, Indians.

(d) Despite such services, the unmet health needs of the American Indian people are severe and the health status of the Indian is far below that of the general population of the United States. For example, for Indians compared to all Americans in 1971, the tuberculosis death rate was over four and one-half times greater, the influenza and pneumonia death rate over one and one-half times greater, and the infant death rate approximately 20 per centum greater.

(e) All other Federal services and programs in fulfillment of the Federal responsibility to Indians are jeopardized by the low health status of the American Indian people.

(f) Further improvement in Indian health is imperiled by—

(1) inadequate, outdated, inefficient, and undermanned facilities. For example, only twenty-four of fifty-one Indian Health Service Hospitals are accredited by the Joint Commission on Accreditation of Hospitals; only thirty-one meet national fire and safety codes; and fifty-two locations with Indian populations have been identified as requiring either new or replacement health centers and stations, or clinics remodeled tor improved or additional service;

(2) shortage of personnel; For example, about one-half of the Service hospitals, four-fifths of the Service hospital outpatient clinics, and one-half of the Service health clinics meet only 80 per centum of staffing standards for their respective services;

(3) insufficient services in such areas as laboratory, hospital inpatient and outpatient, eye care and mental health services, and services available through contracts with private physicians, clinics, and agencies. For example, about 90 per centum of the surgical operations needed for otitis media have not been performed, over 57 per centum of required dental services remain to be provided, and about 98 per centum of hearing aid requirements are unmet;

(4) related support factors. For example, over seven hundred housing units are needed for staff at

remote Service facilities;

(5) lack of access of Indians to health services due to remote residences, undeveloped or underdeveloped communication and transportation systems, and difficult, sometimes severe, climate conditions; and

(6) lack of safe water and sanitary waste disposal services. For example, over thirty-seven thousand four hundred existing and forty-eight thousand nine hundred and sixty planned replacement and renovated Indian housing units need new or upgraded water and sanitation facilities.

(g) The Indian people's growth of confidence in Federal Indian health services is revealed by their increasingly heavy use of such services. Progress toward the goal of better Indian health is dependent on this continued growth of confidence. Both such progress and such confidence are dependent on improved Federal Indian health services.

APPENDIX E — SECTION 1602 OF THE INDIAN HEALTH CARE IMPROVEMENT ACT, 5 U.S.C. § 1602

§ 1602. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy.

APPENDIX F — INDIAN HEALTH SERVICES MANUAL, CHAPTER 13, MATERNAL AND CHILD HEALTH (7-1-85) (EXCERPTS)

Chapter 13
MATERNAL AND CHILD HEALTH

3-13.1 INTRODUCTION

A. Purpose:

This chapter establishes the policies, objectives, procedures, responsibilities and guidelines relating to specific health care activities provided for children, youth and the family by the IHS.

B. Policy:

Comprehensive health services will be provided to children, youth and the family addressing preventive, therapeutic and rehabilitative aspects.

C. Objectives:

1) To promote health services of such quality and availability to children, youth and the family that American Indian and Alaska Native children and adults will have full opportunity to attain and maintain optimal physical and mental health.

2) To provide guidelines and standards as a basis of measurement, evaluation and improvement of services for children, youth and the family.

D. Procedures:

(1) This chapter is divided into program areas defining specific aspects of care.

(2) This chapter will be periodically reviewed and updated to reflect changes or improvements in standards of care.

E. Responsibilities:

(1) Headquarters - Maternal and Child Health (MCH) Program Coordinator, Senior Clinicians of OBGYN and Pediatrics, Chief Nurse-Midwifery Branch and Deputy Chief, Nursing Services Branch.

a. Will work with Area/Program MCH Chiefs in formulating, developing, and evaluating programs and recommendations for the improvement of health and medical care services to children, youth and the family.

b. Will provide liaison with and consultation to other IHS headquarters staff, tribal officials, and other Federal and non-Federal agencies regarding MCH programs and activities.

* * *

3-13.6 CARE OF THE INFANT AND CHILD

A. Purpose:

This section sets forth the IHS policies, objectives,

procedures, responsibilities, and guidelines for meeting specific health needs of infants and children.

B. Policies:

(1) As a component of the health care system of the IHS, health services to infants and children will be made available.

(2) These services should address the preventive, therapeutic and rehabilitative needs of infants and children.

(3) All facilities without a pediatrician on staff should have pediatric consultant site visits quarterly with the content of these visits documented for quality assurance purposes.

C. Objectives:

(1) To define required Area/Program and Service Unit responsibilities in order to provide this care.

(2) To provide for a system that will permit monitoring of compliance with this policy and evaluation of program performance.

D. Procedures:

Each Service Unit must have a written plan and protocol that addresses the following areas of service.

a. The Well Child.

b. The Sick Child.

c. The Handicapped Child.

E. Responsibilities:

(1) Service Unit MCH Program Coordinator will periodically review the program performance and update or change existing plans and protocols.

(2) Area MCH Chief will periodically evaluate the Service Unit's program and evaluate each Service Unit's conformity to the above policies.

F. Program Guidlines:

Service Unit plans & protocols should be developed using these guidelines, in conjunction with standards and guidelines established by the American Academy of Pediatrics and the state's Early and Periodic Screening, Diagnosis and Treatment Program (EPSDT).

* * *

(3) The Handicapped and Chronically Ill Child - services must be provided that will emphasize the importance of preventing handicapping conditions or preventing extension of existing conditions. Specific issues to be addressed:

Appendix F

(a) Early identification of defects: Since early recognition of children with abnormal development is essential to minimize handicaps and identify children not receiving adequate amounts of stimulation in the home, it is essential that every child be developmentally screened at least once by age one with some form of standardized screening instrument, such as the Denver Prescreening Developmental Questionnaire (PDQ) or the Denver Developmental Screening rest. This should then be repeated at least yearly.

Children with an abnormal test or. routine well child screening should receive a comprehensive evaluation and individual education plan from qualified professionals.

(b) Management: To insure adequate long-team treatment and coordination of services for children with handicaps, each Service Unit is to designate one person to serve as Handicapped Child Coordinator. This person will be expected to carry out the following activities:

(1) Maintain an up-to-date register of all children and young adults up to age 21 who have a chronic, handicapping, or potentially handicapping condition.

The registers are to assure continuity of care and communication between the various health care providers.

Appendix F

Four types of conditions are to be addressed:

(a) Children needing frequent medical visits (endocrine problems, seizures, etc.)

(b) Children with established disabilities (mental retardation, etc.)

(c) Children with conditions awaiting future surgery, (example - cleft palate)

(d) Children at risk for problems (prematures, post meningitis, post head injury)

(2) Review the progress of each person at least yearly and serve as or appoint a case manager for those children requiring frequent and continuing medical supervision.

(3) Maintain or have access to a regionalized directory of available services for handicapped children and their families.

Coordinate referral and follow-up, including linkages to other agencies such as State Crippled Children's Programs, Indian Children's Program, Special Education.

(4) Orient the medical staff annually to the existence of the program and the services available.

Appendix F

In addition, it is recommended that the coordinator participate in or organize a community coordinating body consisting at least of a representative from Head Start, the local school special education program, parents of handicapped children, and a representative from the regional developmental disability and special education programs. This group would help facilitate transitions from preschool to school and identify gaps and bottlenecks in existing services.

(c) Prevention: such as prenatal care, genetic counseling, and injury control which are discussed in other sections of the manual.